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Responsibility of international organizations

Comments and observations received from international organizations

Contents

Page

I. Introduction . . . 3

II. Comments and observations received from international organizations . . . 3

A. General remarks . . . 3

International Monetary Fund . . . 3

World Health Organization . . . 4

B. Invocation of the responsibility of an international organization — General considerations . . . 4

International Maritime Organization . . . 4

Organization for the Prohibition of Chemical Weapons . . . 5

World Health Organization . . . 5

C. Draft article 46 — Invocation of responsibility by an injured State or international organization . . . 6

United Nations Educational, Scientific and Cultural Organization . . . 6

D. Draft article 48 — Admissibility of claims . . . 6

Organization for the Prohibition of Chemical Weapons . . . 7

E. Draft article 49 — Loss of the right to invoke responsibility . . . 7

World Health Organization . . . 7

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F. Draft article 50 — Plurality of injured States or international organizations 7
United Nations Educational, Scientific and Cultural Organization 8
G. Draft article 51 — Plurality of responsible States or international organizations 8
United Nations Educational, Scientific and Cultural Organization 9
H. Draft article 52 — Invocation of responsibility by a State or an international organization other than an injured State or international organization 9
World Health Organization 10
I. Countermeasures 10
United Nations Educational, Scientific and Cultural Organization 10
World Health Organization 11

I. Introduction

1. At its fifty-fifth session, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic "Responsibility of international organizations" to international organizations for their comments.[1] Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003, 2004, 2005, 2006, 2007 and 2008 reports.[2] Most recently, the Commission sought comments on chapter VII of its 2008 report[3] and on the issues of particular interest to it noted in paragraphs 29 and 30 of that report.[4]

2. As at 15 March 2009, written comments had been received from the following five international organizations (dates of submission in parentheses): International Maritime Organization (IMO) (15 January 2009); International Monetary Fund (27 February 2009); Organization for the Prohibition of Chemical Weapons (13 January 2009); United Nations Educational, Scientific and Cultural Organization (UNESCO) (12 January 2009); World Health Organization (WHO) (4 February 2009). Those comments are reproduced in section II below, in a topic-by-topic manner. In a submission dated 6 January 2009, the International Atomic Energy Agency indicated that it did not have any comments to provide at this stage. Additional submissions received will be reproduced as addenda to the present report.

II. Comments and observations received from international organizations

A. General remarks

International Monetary Fund

We note the suggestion by the Special Rapporteur that, before completing the first reading, the texts of the draft articles provisionally adopted by the Commission should be reviewed in the light of all comments from States and international organizations. It will be recalled from our prior comments,[5] and from similar comments by a number of other international organizations, that a central issue when considering their international responsibility is that international organizations, unlike States, do not possess a general competence. As the

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52.

[2] The written comments of international organizations received prior to 15 April 2008 are contained in documents A/CN.4/545, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582 and A/CN.4/593 and Add.1.

[3] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10).

[4] Paragraphs 29 and 30 of the 2008 report read as follows:

> 29. The Commission would welcome comments and observations from Governments and international organizations on draft articles 46 to 53, dealing with the invocation of the responsibility of an international organization.
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> 30. The Commission would also welcome comments on issues relating to countermeasures against international organizations, taking into account the discussion of these issues, as reflected in chapter VII.

[5] See A/CN.4/545, A/CN.4/556 and A/CN.4/582.

Commission has recognized in two of the draft articles provisionally adopted, it follows that international organizations cannot be required to take actions that are outside their respective mandates.[6] In our view, that insight should be incorporated into a number of other draft articles, and the Special Rapporteur's suggestion of a review before completing the first reading presents a welcome opportunity to do so. We also believe that it follows that, since the mandates of international organizations are established by international agreement, their acts that are clearly pursuant to such treaties should normally be regarded as consistent with international law.

We hope that the Commission will follow up on the suggestion to organize a meeting with legal advisers of international organizations to engage in a concrete discussion of the issues raised by these and other comments,[7] and we would be pleased to participate in such a meeting.

World Health Organization

At the outset, let us express our congratulations to the Commission and to the Special Rapporteur for having almost reached the end of the first reading of the draft articles in only six years. At the same time, we applaud the invitation extended by the Commission to the legal advisers of a number of international organizations to engage in a discussion with the Commission on the entire set of draft articles on the responsibility of international organizations and on the approach followed thus far by the Commission and the Special Rapporteur. As several comments by international organizations during the course of the project have revealed, the latter are keen to ensure that any codification of the law on the responsibility of international organizations fully reflects their characteristics as subjects of international law and is not detrimental to the full and unimpeded discharge of their respective constitutional functions. This concern is particularly relevant since the Commission has followed the approach of modelling the draft articles on the articles on the responsibility of States for internationally wrongful acts, even though the practice available on many aspects of the responsibility of international organizations is scarce or non-existent and the status of the law in this area is less settled than in the case of States.

B. Invocation of the responsibility of an international organization — General considerations

International Maritime Organization

We are pleased to note that the International Law Commission considered the sixth report by G. Gaja, Special Rapporteur on the topic of the responsibility of international organizations, and has provisionally adopted eight draft articles, thus making substantial progress on this topic. We congratulate the Commission on its achievement and, in particular, pay tribute to Mr. Gaja for the work he has done.

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[6] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 219 (commentary to draft art. 45, para. 4) and *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 294 and 298 (draft art. 52, para. 3 and commentary thereto, para. 10).

[7] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 257.

We would like to make the following brief comments of a general nature.

We note that these draft articles follow, by analogy and mutatis mutandis, the wording of corresponding provisions on State responsibility, supplemented with the views and practices of some international organizations, such as the European Union.

We believe that, in principle, the established rules governing State responsibility might be applied to the responsibility of international organizations, under similar circumstances. However, the European Union, as a regional economic integration organization to which exclusive competence over certain matters has been transferred by its members, is completely different in nature from a United Nations specialized agency such as the International Maritime Organization. Accordingly, the principles that might be applicable to the European Union may not be suitable for IMO.

IMO is a regulatory agency of the United Nations, established to perform certain functions provided for in its constitution for the common interest of its member States and the maritime industry. Whether this organization can take certain actions depends, in the main, on its constitution, the applications of the treaty and non-treaty instruments adopted under its auspices, and the decisions taken by its governing bodies. The latter also exert strict oversight over the activities of the organization.

At this stage, it is still unclear to us how the draft provisions would apply to the activities undertaken by IMO, and what the relationship will be between the draft provisions and the Vienna Convention on the Law of Treaties as well as the Convention on the Privileges and Immunities of the Specialized Agencies. It is also difficult to imagine scenarios that would give rise to the possible application of the draft provisions by our organization.

We would therefore support the suggestion that a meeting be organized between the Commission and the legal advisers of international organizations in order to engage in a concrete discussion of the issues raised by the draft articles, including the question of countermeasures.

Organization for the Prohibition of Chemical Weapons

We find chapters III.B and VII of the report quite wide-ranging, as they include a variety of issues that arise in the context of the international responsibility of international organizations that were dealt with in a similar manner in the articles on responsibility of States for internationally wrongful acts (see General Assembly resolution 56/83, annex). Regarding draft articles 46 to 53, we noticed that they were modelled, with some adjustments, on the corresponding provisions on State responsibility. In our view, these adjustments are appropriate.

World Health Organization

Concerning draft articles 46 to 53, most of them do not raise particular issues, as they replicate the corresponding articles on the responsibility of States on issues for which no particular distinction between States and international organizations seems to be warranted. At the same time, the applicability of some of the articles to international organizations may be difficult in practice.

C. Draft article 46 — Invocation of responsibility by an injured State or international organization

3. Draft article 46, as provisionally adopted by the Commission at its sixtieth session, reads as follows:

Article 46
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) That State or the former international organization individually;

(b) A group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State or that international organization; or

(ii) Is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.[8]

United Nations Educational, Scientific and Cultural Organization

Article 46 (b) envisages a situation in which a breached obligation is owed to a group of States *or* international organizations *or* the international community. In this respect, UNESCO considers that the breach of obligation provided for in article 46 (b) (ii) should be "of such a nature to change the position of all the other States *or* international organizations" rather than of "all the other States *and* international organizations".

D. Draft article 48 — Admissibility of claims

4. Draft article 48, as provisionally adopted by the Commission at its sixtieth session, reads as follows:

Article 48
Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When a rule requiring the exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of

[8] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 164.

another international organization if any available and effective remedy provided by that organization has not been exhausted.[9]

Organization for the Prohibition of Chemical Weapons

We noticed that the Commission decided not to include a provision similar to article 44 on State responsibility regarding the nationality of claims. In its analysis of the issue, the Commission may wish to consider the practical consequences of the absence of such a rule. This rule could be of particular significance when the individuals of a State are injured by acts contrary to international law committed by an international organization from which the State has been unable to obtain satisfaction through the ordinary channels. We believe that this matter is not only relevant to questions of jurisdiction or to the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.

E. Draft article 49 — Loss of the right to invoke responsibility

5. Draft article 49, as provisionally adopted by the Commission at its sixtieth session, reads as follows:

Article 49
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) The injured State or international organization has validly waived the claim;

(b) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.[10]

World Health Organization

The valid waiver of a claim by an international organization under draft article 49, or its acquiescence, may be difficult to ascertain due to the potential complexity of the attribution of competence to the various organs of an organization under its relevant rules. We note that the commentary to that article acknowledges such difficulties.

F. Draft article 50 — Plurality of injured States or international organizations

6. Draft article 50, as provisionally adopted by the Commission at its sixtieth session, reads as follows:

[9] Ibid.
[10] Ibid.

Article 50
Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.[11]

United Nations Educational, Scientific and Cultural Organization

UNESCO notes that there seems to be a contradiction between the commentary of the International Law Commission and the wording of this article. Indeed, the Commission specified in its commentary that this article envisages situations where (a) there is a plurality of injured States; (b) there is a plurality of injured international organizations; (c) there are one or more injured States and one or more injured organizations. Yet article 50, in its current wording, does not foresee a situation in which there are one or more injured States and one or more injured organizations. UNESCO is therefore of the view that if the latter situation is to be envisaged in this article, the wording of the first part of the sentence should be changed to "Where several States *and/or* international organizations". If, however, the intent is to envisage only situations where there are a plurality of injured States or a plurality of injured organizations, then the comments of the Commission should be modified as to exclude the third possible situation.

G. Draft article 51 — Plurality of responsible States or international organizations

7. Draft article 51, as provisionally adopted by the Commission at its sixtieth session, reads as follows:

Article 51
Plurality of responsible States or international organizations

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

2. Subsidiary responsibility, as in the case of draft article 29, may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) Do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) Are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.[12]

[11] Ibid.
[12] Ibid.

United Nations Educational, Scientific and Cultural Organization

According to the International Law Commission, this article envisages a situation in which an international organization is responsible for a wrongful act along with one or more other entities, either international organizations or States. In the view of UNESCO, even though the term "other" in article 51, paragraph 1, could imply "international" organizations, it would be preferable to specify that these "other organizations" must be international.

H. Draft article 52 — Invocation of responsibility by a State or an international organization other than an injured State or international organization

8. Draft article 52, as provisionally adopted by the Commission at its sixtieth session, reads as follows:

Article 52
Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization that is not an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 33; and

(b) Performance of the obligation of reparation in accordance with Part Two, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 47; 48, paragraph 2; and 49 apply to

an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.[13]

World Health Organization

Similar practical and conceptual difficulties characterize in our view also the applicability of draft article 52 to international organizations. For example, it is difficult to identify obligations owed indistinctly to a group of international organizations in view of their status as international entities with limited and different functions, besides cases in which international organizations are parties to the same treaty, as well as the unlikely case of a breach by an international organization of a peremptory norm of such a character as to be generally applicable to any subject of international law. It is therefore quite possible that, as in this case, provisions taken from the context of the responsibility of States which seem on their face easily transposable to international organizations may turn out to be of questionable applicability or of marginal practical relevance.

I. Countermeasures

United Nations Educational, Scientific and Cultural Organization

UNESCO does not have any objection to the inclusion of draft articles on countermeasures. UNESCO will, however, respond to various issues raised in the report of the International Law Commission at its sixtieth session.

Draft article 52 on Object and limits of countermeasures[14] raises no particular objection for UNESCO. In particular, UNESCO agrees with the terms "only if this is not inconsistent with the rules of the [...] organization", used in draft article 52, paragraphs 4 and 5. UNESCO supports not only the reference to the rules of the organization but also, considering that often countermeasures are not specifically provided for by the rules of international organizations, the possibility for an injured member of an international organization to resort to countermeasures which are not explicitly allowed by the rules of the organization.

As regards draft article 55, paragraph 3 (b),[15] concerning conditions relating to resort to countermeasures, UNESCO would agree with the proposals made to extend the exception to disputes pending before a body other than a court or a tribunal provided it has the capacity to make decisions binding on the parties.

As regards draft article 57,[16] UNESCO agrees with the proposals to redraft this article and considers that for a matter of clarity the provisions for "lawful measures" and for "countermeasures" should not be dealt with in the same article.

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[13] Ibid.

[14] For the text of draft article 52 as proposed by the Special Rapporteur, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 141, footnote 567.

[15] For the text of draft article 55 as proposed by the Special Rapporteur, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 141, footnote 570.

[16] For the text of draft article 57 as proposed by the Special Rapporteur, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 142, footnote 572.

World Health Organization

Concerning the delicate topic of countermeasures, the World Health Organization shares the views of those members of the Commission that called for particular caution in introducing draft articles on countermeasures against international organizations. In principle, WHO agrees with the statement by the Special Rapporteur that there is no cogent reason why an international organization that breaches an international obligation should be exempted from countermeasures taken by an injured State or international organization to bring about compliance by the former organization with its obligations. Conversely, it would seem illogical to deprive an international organization injured by a breach of an international obligation by another international organization of the possibility of taking retaliatory measures to induce the latter organization to comply with its obligations.

Having said that, it should be noted that for international organizations of quasi-universal membership such as those of the United Nations system, the possibility for their respective Member States to take countermeasures against them would either be severely limited by the operation of the rules of those organizations, rendering it largely virtual, or would be subject to a *lex specialis* — thus outside of the scope of the draft articles — to the extent that the rules of the organization concerned do not prevent the adoption of countermeasures by its member States.

With regard to the actual countermeasures that international organizations could adopt against other organizations, WHO shares the views of those members of the Commission who would limit them to withholding the performance of contractual obligations under existing treaty relationships. These would often consist of obligations to cooperate with the responsible organizations in various respects, either by implementing joint activities, financing certain activities of the other organizations, providing data and information or consulting on matters of common interest. At the same time, while such measures are theoretically possible, the fact that those obligations are provided not for the benefit of the responsible organizations but rather for the discharge by both organizations of their respective constitutional functions for the benefit of their member States or their populations, should be taken into account. It would be rather difficult for an international organization to suspend its compliance with such obligations in view of their public and functional nature.

Finally, any provision on countermeasures that may be included in the draft articles should minimize the possibility of abuse, considering in particular the different position of States and international organizations from both a legal and a political point of view. It would arguably be easier in practice for States, whether members or not of an international organization, to impose measures presented as countermeasures against it than the reverse. An example could be the refusal of a donor Government to continue financing certain activities of an international organization under a donation or project agreement in response to the non-compliance by the organization of some of its obligations under the same agreement. That measure could have severe repercussions on the possibility for the organization to continue to carry out activities which are of a public nature and in the public interest. It would be legally and practically more difficult for an organization to envisage retaliation against a donor Government which is breaching its obligations to fund certain activities beyond the sanction provided by the constitution of several international organizations, consisting of the loss of the right

to vote in case of non-payment of assessed contribution. The suspension by the organization concerned of its activities would normally be the result of the lack of financial resources; should it be taken as a countermeasure, it would probably be ineffective to induce the donor to honour its obligations and would negatively affect the interests of the beneficiaries of those activities.